KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 213**

Date: **2024 12 09**
File No.: QBG-SA-01328-2016
Judicial Centre: Saskatoon

BETWEEN:

LENNY MORIN — APPLICANT

- and -

SASKATCHEWAN GOVERNMENT INSURANCE

RESPONDENT

Counsel:

Spencer D. Edwards — for the initiating party
Taylor L. Wilcox and Nikita B. Rathwell — for the respondent

JUDGMENT — TOMKA J.
DECEMBER 9, 2024

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[1] Lenny Morin [Mr. Morin] applies for summary judgment seeking to determine whether Saskatchewan Government Insurance [SGI] has properly denied him permanent impairment benefits [PIB] pursuant to ss. 175(1) of *The Automobile Accident Insurance Act*, RSS 1978, c A-35 [*Act*] in relation to a single vehicle rollover accident Mr. Morin was involved in on May 14, 2011 [accident].

[2] The main issues to be determined are whether Mr. Morin was impaired to the point he was incapable of operating a motor vehicle at the time of the accident and whether he was more than 50% at fault for the accident.

[3] The evidence upon which I must make my determination include:

a) affidavit of Lenny Morin sworn June 7, 2023;

b) affidavit of Cassandra Morin sworn June 7, 2023;

c) affidavit of Rachelle Guerrero-Bennett sworn November 10, 2023;

d) affidavit of Esther Rees with expert opinion sworn September 10, 2024;

e) affidavit of Tyson Pederson sworn January 26, 2023;

f) affidavit of Rachelle Guerrero-Bennett sworn October 28, 2024,

g) affidavit of Shalen Biboe sworn July 17, 2024;

h) affidavit of Dawn MacAuley with expert opinion sworn February 14, 2016;

i) affidavit of Jennifer Priel sworn October 24, 2024;

j) the questioning transcripts for the following witnesses with exhibits:

i. Lenny Morin by Ms. Neudorf held January 25, 2018;

ii. Lenny Morin by Mr. Wilcox held August 22, 2024;

iii. Dawn MacAuley held October 7, 2024;

iv. Shalen Biboe held August 22, 2024.

FACTS

[4] The facts for the most part are not in dispute.

[5] Mr. Morin lives in Île-à-la-Crosse, Saskatchewan and works in Buffalo Narrows, Saskatchewan. He works as a welding supervisor at Northwest Fabricators.

[6] Mr. Morin was required to drive approximately 45 – 60 minutes on Highway 155 from Île-à-la-Crosse to Buffalo Narrows to get to work.

[7] On May 14, 2011, Mr. Morin's day began as a normal workday. He drove to Buffalo Narrows for his work shift and clocked in at work at 6:53 a.m. Mr. Morin clocked out of work at approximately 5:30 p.m. that day.

[8] On his way home from work that evening, Mr. Morin was the sole occupant and driver involved in a single vehicle rollover where his vehicle entered the south side of the roadway and came back onto the roadway and rolled. Mr. Morin was ejected from the vehicle as a result of this rollover.

[9] The accident is thought to have occurred at approximately 7:00 p.m. on Highway 155 north of Île-à-la-Crosse, near kilometer 169. The accident scene is approximately an 18-minute drive outside Buffalo Narrows.

[10] A passerby happened upon the accident scene and reported it to R.C.M.P. Calls were made to dispatch of the R.C.M.P. at 7:00 p.m. and emergency medical services [EMS] at 7:05 p.m. on May 14, 2011.

[11] EMS arrived at the scene at approximately 7:15 p.m. The medical records created by EMS do not indicate any alcohol involvement in the accident nor does it identify that the EMS personnel observed a smell of alcohol emitting from Mr. Morin.

[12] R.C.M.P. also attended the accident scene and did not suspect alcohol as being involved in the accident.

[13] Mr. Morin was taken by EMS to St. Joseph's Hospital and Health Centre [St. Joseph's] in Île-à-la-Crosse. At St. Joseph's, Mr. Morin was treated by Dr. Du Toit. Dr. Du Toit's transfer notes to Dr. Shaw at Royal University Hospital [RUH] in Saskatoon, Saskatchewan indicate the following observations: + ETOH Fetor. This is

a reference to Dr. Du Toit's observation of a foul smell of alcohol coming from Mr. Morin.

[14] Mr. Morin was transferred from St. Joseph's to RUH arriving at approximately 12:30 a.m. on May 15, 2011. Upon arrival at RUH, Mr. Morin was treated by the medical professionals at the hospital and subjected to various medical examinations. A blood sample was taken at RUH from Mr. Morin and analyzed.

[15] The blood sample indicated that Mr. Morin's blood toxicology showed at 1:31 a.m. on May 15, 2011 alcohol content of 29 mmol/L in his bloodstream.

[16] Mr. Morin sustained extremely serious injuries as a result of the accident. These injuries include:

a) a traumatic brain injury, fractured skull and severe concussion resulting in near global memory impairment, the impossibility to manage his own finances and it being unlikely that he will be able to live independently in terms of managing self care and higher level activities;

b) a fractured pelvis;

c) a fractured clavicle;

d) fractured ribs; and

e) extensive scarring.

[17] As a result of his injuries from the accident, Mr. Morin has no memory of the accident or the events leading up to it and only recalls waking up later in the RUH after being in a medically induced coma.

[18] Based on his injuries, Mr. Morin completed an application for no fault injury benefits from SGI [application] claiming benefits under Part VIII of the *Act*. Mr. Morin signed the application on July 7, 2011.

[19] Mr. Morin was entitled to Part VIII no fault benefits because of the injuries sustained in the accident. He began to receive an income replacement benefit and benefits for the cost of personal care and assistance of household duties, commonly known as living assistance benefits.

[20] Under the no fault scheme in Saskatchewan, SGI also pays a lump sum PIB to people who suffer permanent injury in a motor vehicle collision. For catastrophic injuries, the maximum benefit is approximately $188,000.

[21] On June 17, 2014, SGI determined that Mr. Morin was entitled to a 100% whole body impairment PIB.

[22] However, on March 30, 2016, SGI sent a decision letter informing Mr. Morin that he was not entitled to PIB [PIB decision]. SGI denied coverage for this benefit on the basis that Mr. Morin was incapable of having proper control of his vehicle as he was impaired at the time of the accident. In addition, Mr. Morin was deemed to be more than 50% responsible for the accident given his level of impairment.

[23] SGI made the PIB decision based on the result of Mr. Morin's blood toxicology test that showed that at 1:31 a.m. on May 15, 2011, he had an alcohol content of 29 mmol/L in his blood, as well as an expert opinion as to the impairment level of Mr. Morin at the time of the accident.

[24] Dawn MacAuley, an expert in toxicology, provided the expert opinion which concluded, based on the medical evidence, Mr. Morin's blood alcohol level at the time of the accident was such that he would have been impaired and most likely was in the advanced state of impairment better described as intoxication at the time of

the accident.

[25] Ms. MacAuley's expert opinion indicates that 29 mmol/L of ETOH in Mr. Morin's bloodstream at 1:30 a.m. on May 15, 2011, equates to a whole blood alcohol level range of 96 to 134 mg % (.096% to .134%) at 1:30 a.m. on May 15, 2011 and 156 to 254 mg % (.156% to .254%) at 7:00 p.m. on May 14, 2011.

[26] Photographs of the accident scene were taken by police (see affidavit of Jennifer Priel, Exhibit A). The photographs show the accident scene, the surroundings and Mr. Morin's vehicle. From the pictures, the accident occurred on a northern Saskatchewan, single laned, paved highway amongst the boreal forest. The road at the accident location is straight with a narrow shoulder. The bush and forest are cut back some distance from the highway. There are no approaches stemming off the highway at the location of the accident.

ISSUES

[27] The following issues are to be determined:

1. Is this an appropriate case for summary judgment?

2. Has SGI met its burden for a proper denial under s. 175 of the *Act*?

    (a) Has SGI proven Mr. Morin was the operator of the vehicle involved in the accident?

    (b) Has SGI proven Mr. Morin was more than 50% at fault for the accident?

    (c) Has SGI proven Mr. Morin was under the influence of alcohol to such an extent that he was incapable of having proper control of his vehicle at the time of the accident?

1. Is this an appropriate case for summary judgment?

[28] The law in relation to summary judgment was recently summarized by Justice Bardai (as he then was) in the case of *Schnell v Stene (Heidinger Estate)*, 2022 SKQB 146 at para 27:

> [27] In *Lund v Edward Warren* (26 January 2022) Saskatoon, QBG 454/2018 (Sask QB), I summarized the law applicable to summary judgment applications at paras. 8-13 as follows:
>
> > [8] The test to be met in a summary judgment application is not in dispute. The question is whether there is a genuine issue requiring a trial. In *Hryniak v Mauldin*, 2014 SCC 7 at para 49, [2014] 1 SCR 87 [*Hryniak*], the Court notes:
> >
> > > 49 There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
> >
> > [9] In Saskatchewan, the procedure for determining applications for summary judgment is set out in Rules 7-2 to 7-5 of *The Queen's Bench Rules*. This procedure has been the subject of numerous decisions in our province, notably, *Tchozewski v Lamontagne*, 2014 SKQB 71, 440 Sask R 34 [*Tchozewski*], *White v Turanich*, 2020 SKQB 5, *Cicansky v Beggs*, 2018 SKQB 91, 25 CPC (8th) 182, *Shephard v 101093126 Saskatchewan Ltd. (Whitewood Inn)*, 2020 SKQB 346 [*Shephard*], *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at paras 30-31, 429 DLR (4th) 269, *LaBuick Investments Inc. v Carpet Gallery of Moose Jaw Ltd.*, 2017 SKQB 341 at para 28 and *Smith v Hawryliw*, 2020 SKQB 169.
> >
> > [10] In a summary judgment application, both parties are required to put their best foot forward which allows the Court to assume that it has the best evidence before it. In the first instance, where a defendant is applying for summary judgment, they must establish that there is no genuine issue requiring a trial. If they do so, the burden shifts to the plaintiff to refute the evidence or risk the case being dismissed. See: *Cicanksy v Beggs*, 2018 SKQB 91 at paras 14-15, 25 CPC (8th) 182, and *Peter Ballantyne Cree Nation v Canada*

(Attorney General), 2016 SKCA 124 at paras 31-32, 485 Sask R 162.

[11] Of course, summary judgment may still be appropriate even if there is a genuine issue in dispute. The summary judgment process recognizes that for many coming before the Court, the cost of a trial is prohibitively expensive. It is of course easy to say in response to a summary judgment application that a more complete evidentiary record will be available at trial, but that does not mean a trial is required or that summary judgment should be denied. If there is a genuine issue in dispute, the question becomes whether an appropriate procedure can be crafted using Rule 7-5(2)(b) to resolve that genuine issue. This tailored approach takes into account a host of factors, including, the complexity of the claim, the amounts in issue, the importance of the issues, the cost, whether better evidence on key issues will be available at trial, whether the Court can fairly evaluate the evidence and whether summary judgment can resolve the entire claim or portions of it. See *Tchozewski*.

[12] As noted in *Shephard* at para 18:

> 18 Summary judgment allows for questions of law, discrete issues or entire claims to be determined without the need for an expensive trial in appropriate circumstances. It provides flexibility and allows the Court to craft an approach that recognizes "that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial." See *Hryniak* at para 27 and Rule 7-5(5)-(6).

[13] If, even with the tailored approach available pursuant to Rule 7-5(2)(b), the Court is unable to weigh the evidence, evaluate credibility, draw reasonable inferences or have confidence in its conclusions, summary judgement should be denied. As the Court put it in *Hryniak* at para 50:

> 50 … a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

> See also *Noga v Wawanesa Mutual Insurance Company*, 2019 SKQB 160 at para 45.

[29] Justice Schwann of the Saskatchewan Court of Appeal has also recently summarized the relevant law in *Seewalt v Saskatchewan*, 2024 SKCA 100 at paras 24-33 [*Seewalt*].

[30] Of significant relevance are paras. 27 through 35 in *Seewalt* as they specifically comment on the enhanced fact-finding features enshrined in Rule 5-7(2) of *The King's Bench Rules*.

[31] In *Seewalt*, Schwann J.A. states as follows:

> [27] This Court, in *McCorriston v Hunter*, 2019 SKCA 106, 33 RFL (8th) 310, expanded on the idea that, in considering whether the summary judgment as a process is suitable in any given case, the judge hearing the matter must answer that question by reference to the evidence and the arguments of the parties:
>
> > [44] … To assess if a trial is required, a Chambers judge must get into the detail of how the issue and evidence interrelate, and then decide if the evidence allows the issue to be fairly resolved. This follows from the idea that no genuine issue requiring a trial exists if facts can be *found*, law applied, and a fair and just determination on the merits achieved.
> >
> > (Emphasis in original)
>
> Leurer J.A. (as he then was) went on to make the important point that, to resolve the process question, courts may resort to the special powers set out in Rule 7-5(2) in order to sort out the facts:
>
> > [44] … In the course of undertaking this process, the judge has discretion whether, if necessary, to use the so-called "new powers" set out in Rule 7-5(2) (i.e., to weigh evidence, evaluate credibility, and draw reasonable inferences) in order to sort out the facts. However, the fundamental question does not change – the question remains whether a trial is required to reach a fair and just determination of the issue.
>
> Also see *Hryniak* [2014 SCC 7, [2014] 1 SCR 87] at para 49, *Blue Hill Excavating* [2019 SKCA 22, [2019] 4 WWR 393] at para 41, *Olafson* [2023 SKCA 67, 45 BLR (6th) 171] at para 75, *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 at para 55, 429 DLR (4th) 269, and *Tchozewski* [2014 SKQB 71, [2014] 7 WWR

397] at paras 30–31.

[28] To summarize, Rule 7-5(1)(a) empowers a court to grant judgment using the summary judgment process, provided the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence. In determining that issue, the judge hearing the application must first decide that question based solely on "the evidence submitted by the parties" (7-5(2)(a)) but may invoke the special powers set out in Rule 7-5(2)(b)(i)–(iii) in "weighing the evidence", in "evaluating the credibility of a deponent", and in "drawing any reasonable inference from the evidence": see *Hryniak* at para 56 and *Tchozewski* at para 31.

[29] Returning to the matter at hand, it is clear from paragraph 37 of the Chambers judge's reasons that she was alert to the need to firstly determine if summary judgment, as a process, was appropriate or if the matter should proceed to trial. In grappling with this issue, she correctly identified Rule 7-5(1) and Rule 7-5(2) as well as the governing jurisprudence on how those rules are to be applied. She also noted that the onus of demonstrating there is no genuine issue requiring a trial is initially on the applicant (in this case, the Government), but once met, "the burden shifts and the respondent [in this case, Mr. Seewalt] must show that a trial is required" (at para 44). The Chambers judge's proposition aligns with case authorities, including *Canada (Attorney General) v Lameman*, 2008 SCC 14, [2008] 1 SCR 372, as discussed by Leurer J. (as he then was) in *Cicansky v Beggs*, 2018 SKQB 91, 25 CPC (8th) 182:

> [16] *Lameman* [2008 SCC 14, [2008] 1 SCR 372] clearly describes the assessment of an application of summary judgment as a two-step process, with a shifting burden of proof. When summary judgment is sought by a defendant, it requires the applicant–defendant to first present evidence to prove there is no genuine issue requiring trial. If this burden is not overcome, the application is dismissed, without requiring evidence from the respondent–plaintiff. If, but only if, the applicant–defendant presents sufficient evidence to prove no genuine issue requiring trial exists, the burden then shifts to the respondent–plaintiff who must refute or counter the applicant–defendant's evidence.

See also *Peter Ballantyne* [2016 SKCA 124, [2017] 1 WWR 685] at paras 31–32 and *Blue Hill Excavating* [2019 SKCA 22, [2019] 4 WWR 393] at paras 22–25.

[30] Finally, the Chambers judge was alert to the conflicting affidavit evidence that had been filed by the parties and appropriately asked herself if resolution of those conflicts necessitated a trial. Citing paragraph 29 from *LaBuick* [2017 SKQB 341] she correctly observed that a court should not decide an issue of fact (including credibility)

solely by preferring one affidavit over another. That said, adopting the principles of law set out in *LaBuick* – notably that while some conflict in the evidence should give reason to pause – the Chambers judge went on to emphasize that conflict alone does not inexorably mean there is a genuine issue requiring trial. A trial may be required, as per *LaBuick*, if "the conflict is such that key aspects of the claim or the defences raised cannot be comfortably resolved on the basis of affidavit evidence alone", or where there is "documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another" (at para 29).

[31] The Chambers judge applied those principles to the Government's application. As mentioned, she was alert to the fact there was a conflict in the evidence about whether forest harvesting had taken place prior to the termination of the lease. That said, for the following reasons, the Chambers judge was not persuaded that a full trial was required:

> (a) there was independent evidence confirming the Government's timeline as to when commercial harvesting eventually took place from representatives of the other defendants;
>
> (b) there was circumstantial evidence of a public awareness campaign that had taken place prior to harvesting, which allowed her to draw an inference in favour of the Government's assertion on timing;
>
> (c) Mr. Seewalt was contacted for purposes of allowing him to provide input into the harvesting plan; and
>
> (d) there was uncontested, supplemental affidavit evidence from Government officials who deposed to when the authorizations for commercial harvesting had been granted and when harvesting eventually took place.

[32] Taken together, the Chambers judge found those considerations undermined Mr. Seewalt's averment in his affidavit about the timing of forest harvesting and, more importantly, allowed her to resolve that evidentiary conflict without the need for a trial. While noting that the parties disagreed on the interpretation to be given to various documents, she nonetheless determined that those documents, as written, would be sufficient to assist her in drawing the necessary findings of fact.

[33] Although the Chambers judge did not conduct her analysis in two discrete steps, as envisioned by Rule 7-5(1) and Rule 7-5(2), I am satisfied that she considered all of the evidence before her and operated from an understanding that the parties had opposing views

> on the harvesting issue. However, by invoking the enhanced fact-finding powers enshrined in Rule 7-5(2) to draw inferences and weigh the evidence, the Chambers judge found herself able to reconcile that conflict. Contrary to Mr. Seewalt's assertion, she did not simply pick one party's version of when forest harvesting had occurred over the other. Her decision to exercise the Rule 7-5(2)(b) powers attracts appellate deference (*Hryniak*):
>
> > [81] … When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) [Ontario's equivalent to Saskatchewan's Rule 7-5(2)(b)] and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.
>
> [34] Neither do I see any evidence that the Chambers judge merely preferred the affidavit of Mr. Longpre (i.e., about whether commercial harvesting had occurred in the park prior to the termination of Mr. Seewalt's lease) over that of Mr. Seewalt's affidavit. As I discuss below, she found support for the Government's assertions elsewhere in the evidence, notably the voluminous (largely uncontested) documentation coupled with the affidavit evidence of representatives from Tolko, Carrier and Forsite.
>
> [35] To conclude, I see no basis for appellate intervention respecting the Chambers judge's decision to proceed with the Government's application by using the summary judgment process.

[32] The parties agree that this dispute is appropriately determined in a summary judgment application. Mr. Morin says there is no genuine issue that would require a trial. SGI contends that there is a genuine issue requiring a trial, but that it is in the interests of justice for this Court to use the powers provided by Rule 7-5(2) of *The King's Bench Rules* to avoid a trial in this matter and decide this application.

[33] I agree with SGI that it appears there is a genuine issue for trial. I say this because there is conflicting evidence potentially impacting the credibility of Mr. Morin's witnesses and the evidence. In addition, there is an admissibility issue relating to an unsworn statement attached to an affidavit as well as an objection to an expert's qualifications before me.

[34] Despite there being a genuine issue for trial, for reasons that will become apparent later in this decision, I agree with SGI that I can fairly and comfortably resolve this dispute using the powers under Rule 7-5(2)(b) of *The King's Bench Rules*, as:

a. The legal test that must be applied in this matter is fairly well-established and not complex.

b. Where there are facts in dispute, the available evidence allows me to make the necessary findings of fact;

c. I am able to fairly evaluate the evidence given in affidavit and transcript form;

d. The summary judgment application will resolve all outstanding claims between the parties.

[35] As such, I have determined that this summary judgment application can be decided on the evidence before me.

2. Has SGI met its burden for a proper denial under s. 175 of the Act?

[36] Section 175 of the *Act* states as follows:

> **When permanent impairment benefits not payable**
>
> 175(1) Notwithstanding any other provision of this Part, an insured is not entitled to any lump sum benefit for a permanent impairment pursuant to Division 6 to which the insured would otherwise be entitled if:
>
> (a) the insured is more than 50% responsible for the accident; and
>
> (b) the insured:
>
> (i) at the time of the accident:
>
> (A) was the operator or had the care and control of a motor vehicle involved in the

accident; and

(B) was under the influence of alcohol or drugs to such an extent that the insured was incapable for the time being of having proper control of the motor vehicle;

(ii) was convicted, with respect to the accident, of:

(A) an offence pursuant to section 220 or 221 of the *Criminal Code* as a result of the operation of a motor vehicle or an offence pursuant to paragraph 320.14(1)(a), (b), (c) or (d), subsection 320.14(2),(3) or (4), subsection 320.15(1)(2) or (3) or section 320.17 of the *Criminal Code*; or

(B) of an offence pursuant to a law of a state of the United States of America substantially similar to an offence mentioned in paragraph (A); or

(iii) at the time of the accident, was the operator of a motor vehicle who:

(A) intentionally caused or attempted to cause bodily injury to another person; and

(B) is convicted of:

(I) an offence set out in section 235, 236, 239, 266, 267, 268, 269 or 320.13 of the *Criminal Code* as a result of the operation of a motor vehicle; or

(II) an offence pursuant to a law of a state of the United States of America substantially similar to an offence mentioned in subparagraph (I).

(2) The insurer may withhold the payment of any benefit pursuant to Division 6 with respect to an accident if, in connection with the accident, the insured has been charged with an offence mentioned in subsection (1) until the disposition of that charge.

(3) If an amount has been withheld pursuant to subsection (2) and the insured is not convicted of an offence mentioned in subsection (1), the insurer shall pay to the insured the amount of the benefit that would have been paid to the insured if the insured had not been charged,

> together with interest in accordance with the regulations.

[37] Both parties agree that the test under s. 175 of the *Act* is a three-part test whereby SGI has the burden of proving each prong of the test.

(a) Has SGI proven Mr. Morin was the operator of the vehicle involved in the accident?

[38] The parties agree that Mr. Morin was the operator of the vehicle at the time of the accident.

(b) Has SGI proven Mr. Morin was more than 50% at fault for the accident?

[39] When determining fault in a motor vehicle accident, it is necessary to consider the evidence relating to the circumstances of the accident, including statements taken from the driver, other witness statements, road conditions, the mechanical state of the vehicle being driven, police reports, etc. If one is fortunate, there may even be an accident reconstruction report.

[40] In satisfying its burden, it is my view, SGI is entitled to rely on the presumption contained in ss. 256(1) of *The Traffic Safety Act*, SS 2004, c T-18.1 [*TSA*]:

[41] Section 256(1) of the *TSA* provides:

> **Onus of proof in accident**
> 256(1) If loss, damage or injury is sustained by a person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on the owner or driver.

[42] Indeed, ss. 256(1) of the *TSA* has been applied by this Court in the past in a case that is very similar to the case at hand. In *Hewitt v Saskatchewan Government Insurance*, 1999 SKQB 98, 185 Sask R 130 [*Hewitt*], the vehicle in which the plaintiff

was driving left the highway and entered an adjacent field where the vehicle rolled, and the plaintiff was ejected causing injury. The plaintiff sought to recover benefits under the *Act* and was required to show that the accident did not occur through his negligence. In defending the claim, the defendant SGI relied on ss. 87(1) of *The Highway Traffic Act*, SS 1986, c H-3.1 (rep) (now ss. 256(1) of the *TSA*) to assert the onus was on the plaintiff to demonstrate that the accident did not occur entirely or solely as a result of his own negligence. The Court applied the provisions of the section without concern for the fact that the collision occurred in a field next to the highway rather than on the highway itself.

[43] I also note that s. 256 of the *TSA* or similar provisions have been applied in other motor vehicle accident cases where fault was in issue. See *Duraroc Consulting Ltd. v Bert Baxter Transport Ltd.*, 2017 SKQB 351, 19 MVR (7th) 19; ***Regnier v Nelson*** (1956), 64 Man R 56 (QB); *Bell Telephone Co. of Canada v Kan Yan Gan Co.*, [1940] OR 510 (Ont CA).

[44] In this case, SGI alleges that Mr. Morin is more than 50% at fault for the accident mainly due to this being a single vehicle accident and the alleged level of impairment at the time of the accident.

[45] This Court has previously considered determinations of fault in the context of s. 175 of the *Act*. See: *Degerness v Saskatchewan Government Insurance*, 2000 SKQB 88 [*Degerness*], appeal to the Saskatchewan Court of Appeal dismissed 2001 SKCA 102; *Hewitt; Szatkowski v Saskatchewan Government Insurance*, 2002 SKQB 430 [*Szatkowski*].

[46] In *Degerness,* Gerein J. considered this issue of fault involving a single vehicle rollover, where alcohol use was alleged and there was a potential argument that a mechanical issue was a factor in the accident. In determining if the plaintiff was more than 50% at fault, Gerein J. considered the road conditions at the time of the accident,

evidence around the alleged mechanical breakdown, photos and an expert opinion. In the end, he concluded the following regarding fault at para. 19:

> [19] Accordingly, when I consider the whole of the evidence, I am satisfied that the vehicle was being driven by the appellant at a speed of about 100 kilometres per hour. There was no mechanical failure of the vehicle. When the appellant hit the gravel portion of the road he lost control of the vehicle. On a balance of probabilities I am satisfied that he was driving at an excessive rate of speed; lost control of the vehicle; and therefore is more than 50 percent responsible for the accident.

[47] I note, although he concluded that the plaintiff was impaired to the point of being incapable of properly operating a vehicle at the time of the accident, Gerein J. did not consider it necessary to consider whether impairment weighed in favor of the plaintiff's culpability for the accident. That being said, I do not consider *Degerness* as authority for the proposition that impairment is not a factor in determining fault under s. 175 of the *Act*. Instead, I am of the view that it was simply unnecessary to consider it based on the facts of the case.

[48] In *Hewitt*, the Court did not consider the plaintiff's impairment as playing a roll in the accident in question. Again, I do not take *Hewitt* as standing for the proposition impairment cannot be considered when determining fault if there is admissible evidence on the subject. Indeed, *Hewitt* is distinguishable from this case as there was evidence of the culpability of another driver on the road and as a result the Court did not conclude the plaintiff was more than 50% at fault. Simply put, *Hewitt* is not a single vehicle accident scenario.

[49] In *Szatkowski*, the driver was involved in a single car accident. The driver due to injury had no recollection of the events leading up to the accident. A passenger in the car did not testify. The Court concluded the driver was driving an automobile on a normal gravel road when he lost control. It was also found avoidance of another vehicle, reduced visibility due to dust or storm and mechanical issues were not factors.

As the driver could not provide any evidence to contradict the description of the accident in the motor vehicle accident report that he lost control on loose gravel, he was found to be more than 50% at fault. Again, despite there being a finding that he was impaired to the point of being incapable of properly operating a motor vehicle, the Court found it unnecessary to rely on it in its fault analysis.

[50] Under Saskatchewan's no fault insurance scheme, a person injured in a motor vehicle accident can appeal a decision made by SGI in relation to their entitlement to no fault injury benefits. These appeals can be made to either the Automobile Accident Injury Commission [Commission] or the Court of Kings Bench. The Commission decisions are not binding on this Court; however, they can be of persuasive value in interpreting sections of the *Act*.

[51] Indeed, there are several Commission decisions dealing with s. 175 of the *Act*. See: *M.M. v Saskatchewan Government Insurance*, 2008 SKAIA 3 [*M.M.*]; *S.O. v Saskatchewan Government Insurance*, 2013 SKAIA 6 [*S.O.*]; *A.T. v Saskatchewan Government Insurance*, 2008 SKAIA 52 [*A.T.*].

[52] In *M.M.* the issue before the Commission was whether M.M. was more than 50% responsible for the accident and whether M.M. was under the influence of alcohol to such an extent that he was incapable of having proper control of the vehicle. The Commission found that SGI did not meet its burden of proof to show that M.M. was more than 50% responsible for the accident, although it was evident in this case that M.M. consumed alcohol before the accident. The Commission did not note why they did not consider the sole fact of M.M.'s impairment in determining fault.

[53] In *A.T.*, the Commission concluded the driver more than 50% at fault without the need to consider her level of impairment. In this case the Commission was able to determine fault simply based on the fact that the driver was driving too fast for the road conditions. It was noted that the driver knew the roads were very icy and

despite that she continued to drive her vehicle at the posted speed of 80 kilometers per hour.

[54] However, several years later the Commission had a chance to revisit the question of whether impairment can be considered in determining fault. In *S.O.* the Commission specifically stated that they did not agree with the panel in *M.M.* that the level of intoxication could not be considered when determining fault.

[55] I am in agreement with the Commission in *S.O.* and I am of the view the Court may consider the level of impairment of the driver as a potential factor in determining fault.

[56] Mr. Morin argues SGI has not met their burden of proving he was more than 50% at fault. He argues the road conditions or potential wildlife in the area could be blamed for the accident, rather than any of his actions.

[57] Indeed, there is affidavit evidence from Mr. Morin's sister, Cassandra Morin, that the road condition of the highway was poor the night of the accident. She also avers that she had seen deer on the same highway the very night of the accident (See: affidavit of Cassandra Morin, paras. 6-11).

[58] Furthermore, Mr. Morin's affidavit at paras. 10-11 provides:

> 10. The road conditions on Highway 155 were very poor and dangerous at the time of my Accident. There were many large potholes on Highway 155. This is particularly the case during the spring thaw period, when the Accident occurred.
>
> 11. There were also many animals around Highway 155, such as deer, coyotes, bears and elk. It was not uncommon for these animals to jump out onto Highway 155 with little or no notice. Animal activity around Highway 155 was heightened during the spring thaw period, when the Accident occurred.

[59] In addition to the Morins' evidence on road conditions, there are photographs of the accident scene, the surrounding area, and Mr. Morin's vehicle.

[60] Generally speaking, the photos show a northern highway. The highway appears paved. There is no indication of potholes at or around the accident location. The highway is straight at the accident location and the bush or forest is cut back some distance from the highway. Lastly, there do not appear to be any unmarked approaches or any approaches connected to the highway in the area of the accident. It is my conclusion the photos are evidence that the road conditions at this scene were not a factor in the accident.

[61] In addition, the motor vehicle accident report describes the accident as follows: “vehicle lost control went from south ditch back onto road, rolled driver ejected” (See: affidavit of Shalen Biboe, Exhibit 1).

[62] Further, the R.C.M.P. Occurrence Notes from May 14, 2011, includes the general report of Cst. Bonstom-Peake, created at 10:17, 2011/05/23. This general report indicates: “the van had significant damage to the sides as it appears that it had rolled side to side on the cement. Approx. 10 to 15 feet north from where the van stopped writer could see significant gouge marks in the pavement where the van must have initially rolled. Writer could also see the marks coming from the ditch on the southside of the road to the north lane close to where the gouge marks were on the road. Writer did not see any evidence of alcohol in the van” (See affidavit of Shalen Biboe, Exhibit 4).

[63] The motor vehicle accident report and the general report make no mention of the condition of the road or wildlife as potential factors in the accident.

[64] Although I do not reject Mr. and Ms. Morin’s description of the condition of Highway 155 generally, their evidence has little relevance and carries little weight to the road conditions at the accident scene at the relevant time. Indeed, the Morins’ evidence only speaks generally about the condition of the highway as a whole and does not speak directly to the portion of the highway where the accident occurred.

Furthermore, the condition of the accident scene as depicted by the photos assists me in concluding that the road conditions at this specific location on this specific day were not a factor in the accident.

[65] Regarding wildlife, I accept that wildlife on northern highways can be expected in the spring. However, there is no evidence to support that wildlife was a factor in this accident. Ms. Morin's evidence of seeing wildlife on the highway the very night of the accident is of only minimal assistance. I note Ms. Morin saw wildlife in a different part of the highway, some distance from the accident scene and at a point of time after the accident occurred. Given the temporal and proximity of Ms. Morin's observation of a deer to the accident, and on the evidence before me, I have concluded that any argument that wildlife caused the accident is speculative.

[66] Lastly, there is indication from the photos that the left side rear wheel and rim from Mr. Morin's vehicle came off at some point during the accident. However, I have no evidence as to when the wheel and rim came off and specifically no evidence or indication it came off just before Mr. Morin lost control. Thus, mechanical breakdown as a cause of the accident is also speculative based on the evidence.

[67] In the end, I find Mr. Morin was under the obligation to drive with due care and attention, as outlined in s. 213 of the *TSA*. Although I understand that he was not charged with an offence under the *TSA*, not being charged does not necessarily support a contention he did not breach this obligation. In my opinion, the description of how the accident occurred in the police reports and the lack of credible admissible evidence of outside factors causing this accident support a finding that Mr. Morin lost control due to driver error or inattention. As such, I find Mr. Morin is more than 50% at fault for the accident.

[68] Indeed, the onus established by ss. 256(1) of the *TSA* dictates the conclusion of fault in this case. However, even if I did not apply the onus in ss. 256(1)

of the *TSA*, I would have independently concluded that the evidence leads to the same conclusion on a balance of probabilities. As I noted, I did not find it necessary to factor in Mr. Morin's potential impairment in my fault analysis based on the facts of this case. Had I done so, it would have only strengthened the basis of my conclusion.

[69] As such, I find SGI has proven Mr. Morin was more than 50% at fault for the accident.

(c) Has SGI proven Mr. Morin was under the influence of alcohol to such an extent that he was incapable of having proper control of his vehicle at the time of the accident?

[70] Both parties filed expert opinions commenting on Mr. Morin's blood test results and his level of impairment at the time of the accident. SGI retained a pharmacologist, Dawn MacAuley, while Mr. Morin relied upon the opinion of Esther Rees, a registered nurse.

SGI's Position

[71] SGI argues that the following evidence proves Mr. Morin was impaired to the level of intoxication at the time of the accident such that he was not capable of having proper control of his vehicle. They rely on:

a. Notes from Dr. Du Toit that he detected the smell of alcohol on Mr. Morin;

b. Mr. Morin's blood test results taken about six and one-half hours after the accident, which showed an ethanol alcohol level of 29 mmol/L; and

c. The expert evidence from Ms. MacAuley.

Mr. Morin's Position

[72] Mr. Morin argues the following proves that he was not impaired to the extent he was incapable of properly operating his vehicle:

a. Dr. Du Toit's notes do not prove Mr. Morin was drinking or impaired. Instead, the rest of the medical documents and police reports suggest the contrary;

b. The evidence of Mr. Morin, Tyson Pederson and Martin Daigneault all prove that Mr. Morin was not drinking or impaired on the day of the accident. Thus, a material assumption in Ms. MacAuley's report have not been proven;

c. Based on Ms. Rees' opinion, it is likely the blood samples testing results were contaminated or otherwise impacted so as to provide a false positive and/or inaccurate result.

The MacAuley Opinons

[73] Ms. MacAuley provided three expert opinions relevant to this case, including a report dated December 7, 2014, an updated reported dated February 24, 2016, and a reply report of Dr. J. Steven Richardson dated February 6, 2024. The report SGI relies upon in this action is the February 24, 2016 report which arose after Ms. MacAuley was provided further information, including the correct time of the accident.

[74] Ms. MacAuley concludes in her report that the 29 mmol/L of ethanol in Mr. Morin's blood sample at 1:31 a.m. on May 15, 2011, equates to a whole blood alcohol level range of 96 to 134 mg% (.096 to .134%) at 1:21 a.m. and 156 to 254 mg% (.156% to .254%) at 7:00 p.m. on May 14, 2011.

[75] Her conclusions were based on two assumptions: normal social drinking concluded at least 30 minutes prior to the accident and that there was no alcohol consumed between the time of the accident and the time the blood sample was taken. Ms. MacAuley further assumed an elimination rate of somewhere between 10 and 20mg% per hour, which is the scientific standard.

[76] In her reports, Ms. MacAuley further provided the opinion that all individuals are impaired with respect to the safe operation of a motor vehicle once their blood alcohol level reaches 100mg% or .1 % and most individuals become intoxicated at about 150 mg% or .15%. This opinion falls within her area of expertise and has been accepted by this Court in the past. See: *Besenski v.Saskatchewan Government Insurance*, 2001 SKQB 310, 209 Sask R 247; *Szatkowski; Degerness*.

[77] I also note, the Commission has also accepted this form of opinion by Ms. MacAuley in several decisions. *S.O* and *E.R. v Saskatchewan Government Insurance*, 2020 SKAIA 14.

Normal Social Drinking Concluding 30 Minutes Before Accident

[78] Mr. Morin accepts Ms. MacAuley has the necessary qualifications and experience to provide the expert opinions and does not object to her opinion being considered by the Court.

[79] However, Mr. Morin takes issue with the assumptions utilized by Ms. MacAuley in her opinion. Specifically, the assumption relating to the drinking pattern prior to the accident. He suggests that:

a. There is no evidence whatsoever to prove that Mr. Morin was drinking or impaired on the day of the accident;

b. Mr. Morin's affidavit, Ms. Morin's affidavit and Mr. Morin's

Neuropsychological Assessment Report show that he was an infrequent/inexperienced drinker.

c. Most of the medical documents suggest that Mr. Morin was not drinking or impaired on the day of the accident;

d. Further, Ms. Rees' opinion should be preferred over Ms. MacAuley's.

[80] Mr. Morin's argument that there is no evidence to prove he was drinking at all or was impaired is not quite correct. I agree with Mr. Morin there is no direct evidence of Mr. Morin's consumption of alcohol during or prior to the accident. However, what is present is circumstantial evidence, namely, the blood alcohol results from a blood sample, the evidence of Ms. MacAuley and Dr. Du Toit's reporting of an excessive smell of alcohol observed coming from Mr. Morin as he was being treated in Île-à-la-Crosse, along with the fact this was a single vehicle accident with no credible evidence of other factors beyond human error causing the accident. Despite there being no direct evidence, the Court is entitled to base findings of fact on circumstantial evidence when that fact can be inferred on the balance of probabilities considering all the evidence.

[81] Mr. Morin's counsel further argues that there is evidence suggesting that the assumption of social drinking is not supportable. Mr. Morin argues his evidence, Ms. Morin's evidence, Mr. Pederson's evidence, and Mr. Daigneault's evidence all prove Mr. Morin was not drinking prior to the accident. If this is correct, Ms. MacAuley's assumption cannot be proven.

[82] Mr. Morin avers at paras. 3, 4, 6 and 7:

> 3. I have ulcerative colitis. Due to my colitis, in 2004 I had surgery removing a large section of my large intestine. Since then, I have worn a colostomy bag. Drinking alcohol is nearly impossible for me due to the pain and inflammation it causes my colon.

> 4. Prior to the Accident, I very rarely drank alcohol. I was usually the designated driver for my friends if we went out because I didn't drink. I have never had any charges for drinking and driving, open alcohol, or tickets or charges for anything alcohol related. I have never drank and drove.
>
> …
>
> 6. At the time of the Accident, I lived in Ile-a-la-Crosse in Northern Saskatchewan with my common law spouse and 4 children. I was working as a welding supervisor at North West Fabricators Limited in Buffalo Narrows. I started work at approximately 8:00 am and finished at approximately 5:00 pm - 5:30 pm. I never consumed alcohol at work while was employed at North West Fabricators Limited, or elsewhere.
>
> 7. After my shifts ended, I never drank alcohol by myself, with co-workers, friends or anyone else, in Buffalo Narrows or anywhere else, before driving back to Ile-a-la-Crosse. I never drank alcohol while driving from Buffalo Narrows to Ile-a-la-Crosse. When I finished work, I would just drive back to Ile-a-la-Crosse so that I could be with my spouse and children.

[83] However, Mr. Morin has no memory of the events of the day of the accident. As such, what he may have done other days *vis-a-vis* drinking alcohol is of little relevance.

[84] Ms. Morin states at para. 3 of her affidavit the following:

> 3. I have known Mr. Morin for his entire life. In that time, he very rarely drank alcohol. And, when he did, it was in moderation and he never drank and drove.

[85] Notably, Ms. Morin also provides no evidence relating to whether Mr. Morin consumed alcohol on the day in question. Furthermore, I am concerned that the substance of her evidence, specifically that during Mr. Morin's lifetime he rarely drank alcohol, is inconsistent with what other family members reported to Dr. Levitt's Neuropsychological report dated July 31, 2013 (See: affidavit of Ms. Rees, Exhibit D, pages 9 and 10). As such, I put little to no weight on her evidence regarding Mr. Morin's history with alcohol.

[86] In regards to Mr. Pederson's affidavit evidence, there is little to no context to his testimony. He does not indicate the extent he was able to observe Mr. Morin on the night of the accident. It is fair that he worked with him that day and did not see him drinking that day. Of course, without any context of the frequency or quality of the opportunity to observe Mr. Morin on the day of the accident, not much can be made of this evidence. In summary judgment proceedings, the parties are to put their best foot forward. If this is indeed the best footing to show that Mr. Morin was not drinking on the day of the accident, it does little to show as much.

[87] Mr. Daigneault has not provided an affidavit. His statement is attached as an exhibit to Rachelle Guerrero-Bennett's affidavit. SGI argues that it is inadmissible hearsay.

[88] Mr. Morin's position is that Ms. Guerrero-Bennett's affidavit properly identifies Mr. Daigneault as the source of the statement and as such the statement is admissible. He relies on the comments of this Court in *Kennett v Diarco Farms Ltd.*, 2018 SKQB 61 at paras 16-22, 21 CPC (8th) 353 which state:

> [16] The plaintiff contends that the combined effect of Rule 7-3(3) and Rule 13-30 is that a chambers judge is able to consider evidence sworn on information and belief on a summary judgment motion provided that the source of the hearsay evidence is identified in compliance with Rule 13-3(3).
>
> [17] I agree with the plaintiffs. The drafters of the Rules would have been aware of the restriction on the admission of hearsay in support of requests for final relief when they contemplated the use of that evidence on summary judgment. To put it another way, the drafters of the Rules would not have granted permission to use hearsay under Rule 7-3(3), but then by implication rescind that permission by incorporating the prohibition on the use of such evidence under Rule 13-30.
>
> [18] Rule 7-3(3) therefore permits the use of affidavits sworn on information and belief on summary judgment when the source of that information has been be disclosed in the affidavit (Rule 13-30(2)). However, that does not mean the court must admit hearsay that complies with the formal requirements of Rule 13-30. Rule 13-30

gives the court receiving evidence under Rule 7-3(3) discretion to refuse to admit the evidence, because Rule 13-3(2) provides only that such evidence "may" be admitted.

[19] This approach to Rule 7-3(3) is consistent with the few cases that directly apply the rule. Several cases have mentioned Rule 7-3(3) in passing only, without a discussion of its relationship to Rule 13-30. See: *Jardine v Saskatoon Police Service*, 2017 SKQB 217 and *Park Derochie Coatings (Saskatchewan) Inc. v 607911 Saskatchewan Ltd.*, 2013 SKQB 422, 434 Sask R 104. Most recently, in *Skjerven v Fauser Energy Inc.*, 2018 SKQB 41 at para 22, Justice Barrington-Foote took it as a given that Rule 7-3(3) permits the use of affidavits sworn on information and belief on a summary judgment application. (I add for completeness that Ontario case law is not helpful on this point, notwithstanding that Rule 7-3(3) is modelled directly on Rule 20.02 of that province's *Rules of Civil Procedure*, RRO 1990, Reg 194. The Ontario rule of court that corresponds to Rule 13-30 (Ontario Rule 39.01(4)) does not appear to contain the same distinction limiting affidavits sworn on information and belief and belief to interlocutory applications.)

[20] *Surespan Construction v Saskatchewan*, 2017 SKQB 55, 64 CLR (4th) 60 [*Surespan*] was cited to me. In that case, Justice Ball dealt with the admissibility of an affidavit sworn on information and belief in support of a request for summary judgment in the following manner:

> 76 The manner in which Mr. Gunnlaugson dealt with Surespan's claim for damages was also problematic. A significant portion of that evidence was not his own. Instead, he "adopted" statements of fact contained in a letter written by Ms. Sargent and attached as an exhibit to his affidavit. Ms. Sargent is now employed by Surespan as its in-house counsel. Her letter contains disputed statements of fact and calculations related to damages which form the basis of Surespan's damage claim. Evidence adduced in that manner is inadmissible as hearsay and offends the best evidence rule. It is not permitted by Rules 7-3(3) and 13-30 of *The Queen's Bench Rules*. Further, if Surespan had wished to rely on Ms. Sargent's expert opinion about the manner in which damages should be calculated in cases of this kind, it should have proffered her as an expert witness so that the Ministry could test her evidence by way of questioning.

[21] I do not read Ball J. as refusing to admit the evidence impugned in that case simply because it was hearsay, but I do understand him to test whether it should be admitted on a principled basis. In the result, he exercised his discretion not to admit the evidence on the basis of its unreliability in the context of the issues before him.

> [22] It might seem curious that hearsay is admissible in the context of summary judgment when it remains prohibited in contexts where other final orders are requested. However, a liberalization of rules of evidence in summary judgment is consistent with an intention by the drafters of the Rules to give breadth to the procedure. This point is driven home by the subsequent direction from the Supreme Court of Canada that a "cultural shift" in judicial thinking is required in order to encourage the use of summary judgment: *Hryniak v Mauldin*, 2014 SCC 7, 2014 SCC7 at paras 2, 49-50, [2014] 1 SCR 87.

[89] However, I disagree with Mr. Morin's counsel's proposition that simply because the statement can be confirmed to be coming from Mr. Daigneault it is admissible in the context of this application. In my view, the Court is still required to consider the necessity and reliability of the evidence as outlined by Ball J. in *Surespan Construction Ltd. v Saskatchewan,* 2017 SKQB 55, 64 CLR (4th) 60 [*Surespan*] before determining if any hearsay evidence is admissible even in the context of a summary judgment application.

[90] Following the result and reasoning in *Surespan,* I am of the view that Mr. Daigneault's statement has none of the hallmarks of reliability for it to be admissible hearsay, even considering the extended powers outlined in Rule 7-5(2). First, the statement is not sworn. Second, we do not know how the statement came about or when it was provided. Third, we do not know the extent of Mr. Daigneault's relationship with Mr. Morin. As such, the reliability of the statement is questionable at best. Even if it were to be admissible, I would not find it compelling due to the reliability concerns and the lack of specifics or context information and would have put little weight on it when taken with the results from the blood analysis and the smell of alcohol noted by Dr. Du Toit after the accident.

[91] In sum, despite the contention of Mr. Morin's counsel, I do not conclude these witness statements support an inference or finding that Mr. Morin was not drinking when considered in the context of the totality of the evidence before me.

[92] In fact, it is my view Mr. and Ms. Morin's evidence support the assumption that Mr. Morin would have been socially drinking rather than binge drinking on the day of the accident.

[93] Furthermore, the suggestion that Mr. Morin was an infrequent drinker or an inexperienced drinker and as such the signs of impairment or intoxication would have surely been noticed by Mr. Pederson and Mr. Daigneault is of no assistance considering the weight I put on their evidence.

[94] Mr. Morin's counsel also argues that the majority of medical records and the R.C.M.P.'s reports all indicate that Mr. Morin was not impaired. I agree, there is little to no evidence of observation of signs of impairment by third parties in this case. Indeed, it does seem odd that the EMS personnel, R.C.M.P. or other medical professions did not observe any alcohol smell coming from him. However, I cannot ignore the fact that a medically trained doctor noted a foul smell of alcohol coming from Mr. Morin and when that is taken in conjunction with the blood testing result, these facts are sufficient to find on the balance of probability that Mr. Morin smelled of alcohol after the accident, which is indicia of impairment. It is acknowledged the smell of alcohol alone is not determinative of impairment or intoxication and must be considered in the context of the whole of the evidence.

[95] Even though it appears that Ms. MacAuley's opinion is based on valid assumptions grounded in the evidence, I still must consider what weight it should be given considering the opinion evidence of Ms. Rees tendered by Mr. Morin. In this regard, I have considered Ms. Rees' evidence, and I prefer Ms. MacAuley's opinion over that offered by Ms. Rees for many reasons which will be explained below.

Opinion of Ms. Esther Rees

[96] The plaintiff tendered the expert opinion of Ms. Rees dated September

10, 2024. Her overall opinion was that Mr. Morin was not impaired at the time of the accident. She reached this conclusion based on two supporting opinions.

Implausibility That Mr. Morin Had a Blood Ethanol Level of 29 mmol/L

[97] First, Ms. Rees was unable to conclude, on a balance of probabilities, that the ethanol level reported came from Mr. Morin's blood sample. The factors she relied upon in coming up to her conclusion include:

a. The records reviewed lacked evidence of alcohol consumption or impairment.

b. The evidence within the records reviewed conflict with the supposition that Mr. Morin's accident was a result of alcohol impairment.

c. There are multiple sworn statements which state that Mr. Morin did not consume alcohol nor was he impaired on the date of the accident.

d. There was no evidence of a chain of custody procedure followed regarding Mr. Morin's blood sample.

e. There was no ethanol testing done for Mr. Morin.

f. Mr. Morin would have had to consume an unreasonable amount of hard alcohol in 30 minutes or less for this result to be even remotely possible.

Inaccurate, and False, Ethanol Results

[98] Second, Ms. Rees concludes even if the blood sample were Mr. Morin's, it is more likely than not that the ethanol result was inaccurate and false based on the following:

a. The manner of the collection of blood;

b. Elevated levels of lactate.

c. Pathophysiology.

Objection to Qualifications

[99] Prior to considering Ms. Rees' opinion and determining what weight it should be afforded, I must deal with SGI's objection that Ms. Rees is not qualified to give the opinions she has given. The four criteria to be qualified as an expert are outlined in the cases of *R v Mohan*, [1994] 2 SCR 9 [*Mohan*] and *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182. Of relevance to SGI's objection is whether Ms. Rees has the "special or peculiar knowledge through study or experience" in respect of the matter on which she undertakes to testify (*Mohan* at 25).

[100] Specifically, SGI objected to Ms. Rees being qualified in the following areas:

a. Toxicology;

b. Pharmacology;

c. Forensic alcohol testing;

d. Pharmacological kinetics of alcohol;

e. Analysis of biological specimens for alcohol content.

f. Forensic sciences specific to alcohol testing.

[101] To deal with the objection to Ms. Rees' qualification, I discussed options with counsel regarding the procedure to be followed to determine the qualification

objection. I did offer Mr. Morin the opportunity to adjourn the matter so that Ms. Rees could be present and questioned in person on her qualifications. However, counsel agreed we should proceed on the evidence available and submissions. With the agreement of counsel, I held a modified mini-*Mohan* hearing. Both parties provided submissions on the scope to which Ms. Rees should be qualified. In addition to the submissions, I had the benefit of the transcripts of SGI's questioning of Ms. Rees, her report and an outline of her qualifications as provided in her report. Based on the evidence before me and the submissions of counsel, I have concluded there was a sufficient basis for me to decide the scope to which Ms. Rees should be qualified to give expert opinion evidence.

[102] Ms. Rees' qualifications and experience are outlined in her Curriculum Vitae and in her report under the heading Statement of Qualifications which I will reproduce for convenience:

> Statement of Qualifications
>
> I am a Registered Nurse licensed with the College and Association of Nurses of the Northwest Territories and Nunavut (CANNN) as well as the College of Registered Nurses of Saskatchewan (CRNS). I graduated from the University of Saskatchewan with a Bachelor of Science in Nursing in 2010 and have been employed full-time in the nursing profession since that time.
>
> I began my nursing career on Surgery 5000, a general surgery and trauma unit, at the Royal University Hospital in Saskatoon, Saskatchewan, and was employed there full-time for ten years. On Surgery 5000, I worked closely with a number of surgical teams specializing in General Surgery, Colorectal Surgery, Hepatobiliary Surgery, Gynaecologica/Oncological Surgery, and Trauma patients.
>
> In August of 2020 I began working as an Acute Care Nurse for the Government of the Northwest Territories. I worked on the Acute Care Unit at the Inuvik Regional Hospital in Inuvik, Northwest Territories for almost three years before stepping into the role of Clinical Nurse Educator for Acute Care Services. On the Acute Care Unit, I was responsible for the nursing care of a variety of patients, including, but not limited to: newborns, post-partum, pediatric, medical, surgical, psychiatric, geriatric, and palliative. I was also cross-trained to assist in the Emergency Department as well as the Post Anesthesia Recovery

> Room. In my Clinical Nurse Educator role, I am responsible for the Acute Care Unit, Obstetrical Care, the Emergency Department, and the Operating Room.
>
> (Affidavit of Esther Rees, Exhibit A)

[103] On questioning, Ms. Rees admitted to having no specialized knowledge or experience in the areas of contention (See: Ms. Rees' questioning transcript at pages 8-9). Further, her evidence during questioning was:

a. She has never written any peer reviewed articles on pharmacology or toxicology.
b. She has no specific accreditation in the fields of pharmacology or toxicology.
c. She has no specific accreditation in the field of forensic science.
d. She has never analyzed a blood sample for ethanol.
e. She has never been qualified by the Court as an expert witness in nursing or otherwise (See: Ms. Rees' questioning transcript at page 10)

[104] Considering the evidence before me and the submissions of counsel, I agree with SGI that Ms. Rees does not have the necessary special knowledge or experience or training in toxicology, pharmacology, forensic alcohol testing, pharmacological kinetics of alcohol, analysis of biological specimens for alcohol content or forensic science specific to alcohol testing. As such, I have determined I cannot qualify her to give expert testimony in those specific areas.

[105] However, Ms. Rees does have the necessary experience and training to provide expert opinion evidence in nursing, nursing practices and standard of care of nurses. As such, she is qualified as an expert to give opinion evidence *vis-a-vis* trauma nursing including the standard of care relating to nursing, best practices for extraction of blood samples in trauma and non-trauma situations by nurses, potential causes of blood sample contamination and best nursing practices to avoid the same.

[106] Given my determination on qualifications, lengthy portions of Ms. Rees' report deal with areas outside her expertise and no weight can be attributable to any such opinion. Because of this, there was not much from Ms. Rees' evidence that could assist Mr. Morin's position.

[107] Specifically, I have not accepted the first branch of Ms. Rees' opinion regarding the impossibility that Mr. Morin's blood alcohol could have been as reported from the blood samples. This opinion, in my view, is outside her area of expertise and is in fact based on assumptions that are not supported by admissible evidence. Therefore, I have given no weight to this branch of her opinion.

[108] Regarding the second portion of her opinion, namely that the ethanol results were inaccurate or false, I conclude that this opinion is also flawed. I do not accept it as being supported by the evidence. For the most part, this portion of the opinion is based on supposition and speculation. For example, even though a doctor and not a phlebotomist or nurse took the blood sample, and this may not be best practice, there is no evidence that the procedure used by the doctor was incorrect or improper. Second, we can all agree that the trauma unit is busy and chaotic but there is no evidence it resulted in improper procedures being used *vis-a-vis* the use of alcohol swabs, failing to let the swabbed site dry prior to taking a blood sample or any other procedure. There is just no evidence of any problem in the collection of the blood samples. Also, there is no evidence that Mr. Morin's blood samples were improperly marked.

[109] A similar attack on the taking of blood samples was attempted and rejected by the Commission in *A.T.* Like the finding in *A.T.*, I find that the opinions expressed about the taking of the blood sample are speculative and not supported by the evidence. Instead, the best that can be said is there may be a mere possibility of an issue of taking the blood. However, a mere possibility is in my estimation speculation in its purest form.

[110] Further, I find that Ms. Rees' opinion that the blood ethanol results could be falsely elevated due to elevated lactate levels is an opinion outside her qualified area of expertise and as such cannot be considered. However, even if I were to accept this opinion as falling within her expertise, I note the strength of this opinion is questionable as Ms. Rees has admitted the following on cross-examination:

a. the scientific article she cited for this proposition stated that a person would need both a large excess of lactate and the compound lactate dehydrogenase to produce a false-positive ethanol result.

b. Ms. Rees had no information regarding Mr. Morin's lactate dehydrogenase levels.

c. Mr. Morin did not have the requisite level of elevated lactate to cause a false-positive result, even if his lactate dehydrogenase level was also elevated (Transcript pages 40-46).

[111] As, such, it is clear to me the evidence does not support the opinion that increased lactate was a factor supporting an opinion the ethanol testing was inaccurate or false in this case. At the very best, I could give little weight to this portion of the opinion.

[112] Similarity, it is questionable whether Ms. Rees' opinions regarding a potential false-positive result because of pathophysiology or "third spacing" can be relied upon as it was also weakened. On questioning she admitted that there was no signs in Mr. Morin's medical records of third spacing, or of the common symptoms of third spacing such as edema.

[113] In the end, I find I can put extremely little weight on Ms. Rees' opinion that the testing of Mr. Morin's blood shows an inaccurate or false-positive result.

[114] To be clear, I have found as a fact that Mr. Morin's blood alcohol level at the time of the accident was as calculated by Ms. MacAuley and I have accepted Mr. Morin would have been impaired by alcohol at the time of the accident to the point he was rendered incapable of proper control of a motor vehicle based on his level of impairment at the time of the accident, that this was a single vehicle accident with no evidence of other factors contributing to the accident. Further, I am not persuaded that the results of testing Mr. Morin's blood are in question.

[115] As such, SGI has proven on the balance of probabilities that Mr. Morin was impaired by alcohol to the point he was incapable of operating his vehicle at the time of the accident.

CONCLUSION

[116] I have concluded SGI has proven, on a balance of probabilities, the requirements for a denial of PIB under s. 175 of the *Act*. Therefore, Mr. Morin's application and this action are dismissed.

[117] Given SGI was successful on this application, and the action, as is customary, I award costs to SGI. Mr. Morin is to pay costs in the amount of $1,000.

J.
M.E. TOMKA